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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1545

FRANK J. PATE, Warden of the Illinois State Penitentiary,

Petitioner,

vs.

HONORABLE JOSEPH SAM PERRY, United States District Judge,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

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Attorney General,
State of Illinois,
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---

Petitioner, Warden Frank J. Pate, prays that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The Order entered by the United States Court of Appeals, Seventh Circuit, is attached hereto as Appendix B. No opinion was handed down.

JURISDICTION

On December 8, 1969, U.S. District Court Judge Joseph Sam Perry denied Warden Pate's Motion to dismiss an Amended Petition for Habeas Corpus. The judge also ordered Warden Pate to file an Answer. Warden Pate then filed a Petition for Writ of Prohibition and/or Mandamus which was denied by the Court of Appeals for the Seventh Circuit on February 10, 1970. No opinion was handed down by the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1). *Cf. Will* v. *United States,* 389 U.S. 90 (1967); *Harris* v. *Nelson,* 394 U.S. 286 (1969).

QUESTIONS PRESENTED

1. Whether federal habeas corpus is an appropriate way of determining a state prisoner's sanity, when the prisoner deliberately refuses to raise the matter under a state statute expressly applicable to his situation.

2. Whether a District Court should hold an evidentiary hearing on a contention made in a successive application for federal habeas corpus, when the files and records of the case show conclusively that the contention is false.

3. Whether a District Court should hold an evidentiary hearing on a contention made in a successive habeas corpus petition, when the matter was adjudicated during a previous federal evidentiary hearing, the contention was rejected by the Court of Appeals, and there has been no intervening change in the law.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. Section 2244 (b):

"When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied .... release from custody or other remedy on the application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States .... unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

28 U.S.C. Section 2254 (b) and (c):

"b. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

c. An applicant shall not be deemed to have exhausted the remedies available in the courts of the State ... if he has the right under the law of the State to raise, by any available procedure, the question presented."

Illinois Revised Statutes Chapter 91½, Sections 141, 142 (1969):

"141. **Persons in need of mental treatment confined in certain penal institutions—Petition—Physicians'**

certificates.) In the event that any person is sentenced and committed under the laws of this State or the ordinances or resolutions of any municipal corporation or political subdivision to any penal or correctional institution other than the penitentiary or reformatory, any person 18 years of age or over may file with the Circuit Court a petition asserting that the person named in the petition has become in need of mental treatment since his committment. The petition shall be accompanied by the certificate of a physician stating in reasonable detail the basis for the conclusion of said certificate that the person whose hospitalization is desired is in need of mental treatment as that term is defined in Section 1-11 of the Mental Health Code.

The petitioner shall provide the State's Attorney and the person named in the petition with a copy of the petition.

142. **Hearing on petition — Trial — Court Order.)** The court shall set a date for a hearing on the petition within 5 days excluding Saturdays, Sundays and holidays, after the filing of the petition.

The hearing shall be conducted in the manner prescribed in Sections 9-2 through 9-4 of the "Mental Health Code of 1967," approved August 14, 1967, as now and hereafter amended. If the jury by its verdict, or the court if no jury is requested, finds that the named person is not in need of mental treatment, he shall be returned to the institution to which he was sentenced and committed. If the jury by its verdict, or the court if no jury is requested, finds that the named person is in need of mental treatment, the court shall commit him to the Department of Mental Health. If the named person is deemed to no longer require hospitalization for mental treament and the time for which he was sentenced has not expired, he shall be returned by the Department of Mental Health to the penal or correctional institution from which he was committed to finish his original sentence. If the time

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has expired, he shall be discharged in accordance with Section 10-4 of the "Mental Health Code of 1967," approved August 14, 1967, as now and hereafter amended."

Illinois Revised Statutes Chapter 38, article 104 (1969):

Section 104-1. **Definition.)** For the purpose of this Article, "incompetent" means a person charged with an offense who is unable because of a mental condition:

c. After a death sentence has been imposed, to understand the nature and purpose of such sentence.

Section 104-2. **Proceedings to Determine Competency.)** (a) If . . . after a death sentence has been imposed but before execution of that sentence, the court has reason to believe that the defendant is incompetent the court . . . . shall impanel a jury to determine the defendant's competency. If a jury is waived by the defendant, the court shall conduct a hearing to determine the defendant's competency.

• • •

(c) The burden of going forward with evidence of the defendant's incompetency shall be on the party, if any, requesting that determination.

(d) The court may appoint qualified experts who shall be compensated by the county to examine the defendant with regard to his competency and to testify at the hearing. Any party may introduce at the hearing other evidence regarding the defendant's competency. No statement made by the defendant in the course of any examination into his incompetency provided for by this Section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

• • •

(f) If the defendant is found to be incompetent, he shall be committed or remain subject to the further order of the court in accordance with Section 104-3 of this Code.

Section 104-3. **Commitment of Incompetent.)** (a) A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition.

(b) When reasonable grounds exist to believe that an incompetent is now competent the court in the county wherein the incompetent is confined or the court in which incompetency was found shall conduct a hearing in accordance with this Article to determine the person's present mental condition. Reasonable notice of such hearing shall be given to the State, the incompetent and to his attorney of record, if any. If the court, following such hearing, finds the person to be competent the proceedings pending against him shall be resumed.

STATEMENT OF THE CASE

On December 8, 1969, U.S. District Court Judge Joseph Sam Perry denied Warden Pate's Motion to Dismiss an Amended Petition for Habeas Corpus in *United States Ex Rel Townsend* v. *Pate,* No. 67 C 389 (U. S. District Court for the Northern District of Illinois, Eastern Division). That Amended Petition contained, among other contentions, the following alleged grounds for relief:

1. The infliction of the death penalty on Townsend would constitute cruel and unusual punishment.

2. Townsend was deprived of his right to counsel for two weeks after his arrest, during which time he made a coerced confession.

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3. The prosecution withheld from defense counsel and from the State jury the information that Townsend's confession was obtained by use of drugs.

4. Townsend had deteriorated into a state of insanity. In the motion to dismiss, Warden Pate pointed out that there was a State statute which expressly gave Townsend the right to adjudicate the question of his sanity in the State courts. The Warden also included as part of his motion a two volume Appendix containing not only the original State court proceedings, but also the transcript of the prior federal evidentiary hearing. This Appendix showed that defense counsel, at the State trial, knew of the drugs being injected and, in fact, the defense was primarily predicated on that knowledge. The Appendix also showed that Townsend's confession had been found voluntary at the close of a federal evidentiary hearing in 1963.

During the course of argument on the State's motion to dismiss, the Warden's counsel asked for a ruling on the individual points raised by the Petition so that the scope of the evidentiary hearing might possibly be narrowed. Judge Perry, however, refused to grant any part of the motion to dismiss, and he ordered the Warden to fully answer the Amended Petition. The Judge further indicated that he would, on his own motion, order a psychiatric examination of the prisoner Townsend. The motion to dismiss denied by Judge Perry was the sixth pleading in which the State had argued that an evidentiary hearing was not proper or necessary on those four contentions.

Warden Pate then filed a Petition for Writ of Mandamus and/or Prohibition with the U.S. Court of Appeals for the Seventh Circuit, asking, in part, that the Court prohibit Judge Perry from conducting a hearing or requiring an answer as to any question where he did not have

any jurisdiction or was exceeding or abusing his jurisdiction. Warden Pate's Petition for Writ of Prohibition and/or Mandamus was denied without opinion on February 10, 1970. A full history of the Townsend case is set forth in Appendix A, but some of the releveant facts leading up to the Petition in this Court are as follows:

In April of 1955, Charles Townsend was found guilty of murder in a State court proceeding and was sentenced to death (Two volume Appendix which is part of this Record, p. 48). Townsend's defense was almost entirely predicated on the alleged involuntariness of the confession. Thus, defense counsel filed a motion to suppress the defendant's confession and produced medical testimony in an attempt to show that the confession was dug induced, and, therefore, involuntary (Two volume Appendix, pp. 42, 43; 335-392). When the motion to suppress was denied, defense counsel again argued before the jury (as they were allowed to do under Illinois law) that the confession should not be given any weight because it was drug induced and involuntary. The defendant Townsend himself testified that he was injected with a drug and that it had an effect upon him, and a pharmacologist testified as a defense witness as to the effects of such drugs. (Two volume Appendix, pp. 66-73; 563-569; 735-765) Two doctors testified for the State as to the effects of the drugs (Two volume Appendix, pp. 780-797). At all stages of the proceedings, the defense counsel were entirely aware that Townsend had been given medication to relieve drug addiction withdrawal pains.

After Townsend was found guilty and was unsuccessful in various State proceedings, he instituted a federal habeas corpus proceeding against the Cook County officials entrusted with his custody (U.S. District Court No. 58 C 2140). The federal habeas corpus suit proceeded through

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various stages of federal litigation until March of 1963, when this Court remanded the case to the U.S. District Court for an evidentiary hearing on Townsend's Petition for a Writ of Habeas Corpus. *Townsend* v. *Sain*, 372 U.S. 293.

In December of 1963, the evidentiary hearing was held in accordance with the mandate of this Court. Again, extensive medical testimony was presented as to the medication given Townsend prior to his confession (Two volume Appendix, pp. 1080-1131; 1166-1215). It was also brought out at the hearing that Townsend had not had counsel for a period of time after his arrest in 1954. (Two volume Appendix, p. 1029). At the end of the federal evidentiary hearing, the Honorable Judge Perry found:

> "2. The confession made by Charles Townsend to the murder of Jack Boone was not drug induced.
>
> 3. The confession made by Charles Townsend to the murder of Jack Boone was not obtained by narcointerrogation." (Two volume Appendix, p. 964)

Judge Perry concluded that "the confession of Charles Townsend was voluntary" (Two volume Appendix, p. 966). However, because of certain alleged evidentiary matters, the District Court Judge ordered issuance of the writ and the County officials appealed. (Two volume Appendix, pp. 963-972).

The Court of Appeals for the Seventh Circuit reversed, holding that the alleged evidentiary matters were purely State matters and of no constitutional significance. In reaching this decision, the Court of Appeals also said:

> "One contention, however, needs comment. Petitioner now says that, after having been arrested on January 1, 1954, he was not afforded the opportunity of consulting with counsel for a period of two weeks;

that he was deprived of the benefit of counsel and, therefore, due process during the period of interrogation when his confession was given . . . .

Because of the holding in *Escobedo* v. *Illinois*, we nevertheless have examined Petitioner's contention and believe it has no merit." *Townsend* v. *Ogilvie*, 334 F. 2d 837, 842, 843 (7th Cir. 1964).

The same case was pursued by Townsend until it was finally dismissed shortly before March of 1967. Townsend then filed a new Petition for Writ of Habeas Corpus under the present number of the case (U.S. District Court, Northern District of Illinois, Eastern Division, No. 67 C 389). The new Petition for Habeas Corpus alleged the following grounds for relief:

1. Infliction of the death penalty on Townsend, after such a long period of time, would constitute cruel and unusual punishment;

2. Townsend was deprived of his right to counsel for two weeks after his arrest, during which time he made a coerced confession;

3. The prosecution withheld from the defense and from the State jury the information that Townsend's confession was obtained by use of drugs;

4. Townsend had deteriorated into a state of insanity.

The Illinois statutes then provided (as they do now) that, if a prisoner confined in certain penal institutions became mentally ill, "any interested person" could file a petition to commit the prisoner to a proper mental institution. Illinois Revised Statutes, Chapter 91½, Sections 141, 142 (1969). A prisoner also had the right to an adjudication in the State courts if he claimed he had become insane after a death sentence had been imposed, but before the penalty had been carried out. Illinois Revised Statutes,

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Chapter 38, Article 104 (1967). Townsend made no attempt to pursue these state remedies before filing the second federal proceeding.

The new habeas corpus suit was directed against the County officials, who thereafter filed a Motion to Dismiss, a Return, an Amended Motion to Dismiss and an Answer. The County officials further sought leave to file a Motion for Judgment on the pleadings. At all stages of the proceedings, the officials urged that Judge Perry did not have jurisdiction to hold an evidentiary hearing and that there had been an abuse of the writ. All of the motions were denied, and the judge set a date for a hearing.

In the meantime, Townsend was transferred from the Cook County Jail to the Illinois State Penitentiary in an unrelated reorganization of the jails. The County officials, who no longer had custody, filed a Motion to Dismiss for that reason, and the Motion was granted. An Amended Petition for Writ of Habeas Corpus was then filed on Townsend's behalf. The Amended Petition not only substituted Warden Pate as the party respondent, but it also added three additional grounds for relief which were primarily based upon *Witherspoon* v. *Illinois,* 391 U.S. 510. Unlike William Witherspoon, however, Charles Townsend refused to use the State remedies whose availability had been repeatedly pointed out. See *People* v. *Witherspoon,* 36 Ill. 2d 471 (1967).

Warden Pate, by his attorneys, filed a Motion to Dismiss which again claimed an abuse of the writ and which raised the lack of Federal jurisdiction. This motion set forth essentially the same arguments raised by the County officials. During the course of oral argument on the motion to dismiss, Warden Pate's counsel repeatedly asked for a ruling as to specific points so that the scope of the eviden-

tiary hearing might be determined. The judge, however, refused to rule on individual points, and he orederd the Warden to file an answer within 20 days (See Appendix C). The judge also indicated that he would, on his own motion, order a psychiatric examination of Townsend. Warden Pate then filed the Petition for Writ of Prohibition and/or Mandamus with the U.S. Court of Appeals for the Seventh Circuit. The Warden's Petition was denied by the Court of Appeals without opinion on February 10, 1970.

REASONS FOR GRANTING THE WRIT

This case presents squarely an important problem arising in the relationship of the federal judicial system to the criminal justice administration of the states—must a state again submit to a federal evidentiary hearing where a contention has been previously adjudicated or where a *habeas* petitioner deliberately refuses to avail himself of a full and fair state remedy? Is it the obligation of federal courts, adherence to which was refused by the District Court and the Court of Appeals below, to refrain from straining the delicate state-federal balance even further in these circumstances?

This Court should grant Certiorari to further the *use*, by preventing such an *abuse*, of the Great Writ.

I.

A STATE PRISONER, WHO IS DELIBERATELY REFUSING TO USE AN APPLICABLE, AVAILABLE STATE REMEDY, SHOULD NOT BE GRANTED AN EVIDENTIARY HEARING ON A CONTENTION MADE IN A SUCCESSIVE APPLICATION FOR FEDERAL HABEAS CORPUS.

Six years after he was granted an evidentiary hearing on a previous Petition for Writ of Habeas Corpus, Townsend filed a second Petition for Habeas Corpus, alleging that he had deteriorated into a state of insanity. The State agreed that an insane person should not be put to death, but it also pointed out that there was a State statute which expressly gave Townsend the right to litigate this matter in the State courts. Despite this express State remedy, the prisoner insists that the matter be litigated in the federal courts by means of habeas corpus, and the District Court agreed by denying numerous motions to dismiss and by indicating that a federal evidentiary hearing would be held on this point. Since the District Court is encouraging a deliberate bypass of available State remedies, an important question is presented and should be decided by this Court—Does Section 2254 of Title 28, requiring exhaustion of State remedies, have any efficacy at all?

Although the force and effect of 28 U.S.C. Section 2254 was severely limited in *Fay* v. *Noia,* 372 U.S. 391 (1963), this Court has since that time repeatedly emphasized the desirability of exhausting State remedies. For example, in *Case* v. *Nebraska,* 381 U.S. 336 (1965), Justice Brennan said in his concurring opinion:

> "The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not

> to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws . . . If, by effective corrective process, the States assumed their burden [of providing fair and just procedures], the exhaustion requirement of 28 U.S.C. Section 2254 (1958 ed.) would clearly promote State primacy in the implementation of these guarantees . . . .
>
> None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate State procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the Federal District Court in State criminal procedure." (381 U.S. at 344-346)

In this case the State has adopted a fair, just state procedure which is applicable to the situation. Despite this, the prisoner deliberately refuses to present the matter to the Illinois courts, and the District Court has sustained this refusal. What purpose is served by the enactment of such state procedures if a state prisoner can, at will, choose to litigate, from the beginning, in federal courts increasingly clogged with *habeas* petitions? In proceeding to an evidentiary hearing on the alleged insanity, the District Court is, in effect, acting as a state court conducting a competency proceeding. Judge Perry's action runs contrary to the attitude of most Federal District Courts, which have indicated that a state prisoner's sanity or insanity is more properly adjudicated in the State courts rather than in the Federal courts (See *e.g., Williams* v. *Overholser,* 162 F. Supp. 514, 517 (D.C.D.C. 1958), *modified,* 259 F. 2d 175 (D.C. Cir. 1958); *United States* v. *Ragen,* 167, F. 2d 543 (7th Cir. 1948), *cert. den.,* 335 U.S. 830 (1948). But *cf. Pate* v. *Robinson,* 383 U.S. 375 (1966)).

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Furthermore, this is not the first time in this case that Judge Perry has become involved with purely state matters (See *United States* v. *Ogilvie,* 334 F. 2d at 842, 843). This Court should grant Certiorari to determine if the Federal District Courts, which are already burdened with substantial questions, should become involved in state competency matters, and if 28 U.S.C. Section 2254 still has any meaning.

II.

IN HOLDING THAT THE STATE PRISONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON A CONTENTION CONCLUSIVELY SHOWN BY THE RECORD TO BE WITHOUT MERIT, THE DISTRICT COURT IS ACTING IN CONFLICT WITH SANDERS v. UNITED STATES, AND THE U.S. COURT OF APPEALS HAS SANCTIONED THIS ABUSE OF DISCRETION BY REFUSING TO GRANT A WRIT OF PROHIBITION.

In this most recent Petition for Writ of Habeas Corpus, Townsend claimed that the prosecution had withheld from the defense and from the state jury information that his confession was drug induced. The State wonders how it can be claimed in good faith that the prosecution withheld information from the defense when the entire theory of the defense at the state trial was predicated on this information. The State court record (which was reproduced in the two volume Appendix and which was made an Exhibit to the Motion to Dismiss) conclusively shows that the defense and the jury, during Townsend's state trial, were well aware that Townsend's confession was made after he had been given medication to relieve drug addiction with-

drawal pains. The defense evidenced its knowledge, that Townsend had been given drugs, by filing a motion to suppress the confession and by producing medical testimony in an attempt to show that the confession was drug induced and therefore involuntary. (Two volume Appendix, pp. 42, 43, 827-41). Townsend himself testified that he was injected with a drug and that it had an effect upon him (Two volume Appendix, pp. 66-73; 563-569). A pharmacologist testified as a defense witness as to the effect of such drugs. (Two volume Appendix pp. 335-391; 735-765). Two other doctors also testified before the jury as to the effect of the drugs which had been given to alleviate the drug withdrawal symptoms (Two volume Appendix, pp. 662-695; 781-797).

Furthermore, at the plenary hearing upon his prior habeas corpus petition in case No. 58 C 2140, Townsend again submitted extensive evidence on this point in a hearing commencing December 17, 1963. At the conclusion of that hearing, the District Court held that:

> "2. The confession of Charles Townsend to the murder of Jack Boone was not drug induced.
> 3. The confession made by Charles Townsend to the murder of Jack Boone was not induced by narco-interrogation." (Two volume Appendix, p. 964)

The District Court then concluded that "the confession of of Charles Townsend was voluntary." (Two volume Appendix, p. 966).

The Record before Judge Perry at this time therefore shows, first, that the prosecution did not withhold information as to the injection of drugs, and, second, that the drugs had not caused an involuntary confession. Since the files and records of the case showed that Townsend's contention was without merit, Judge Perry should have been

guided by what this Court said in *Sanders* v. *United States*:

> "These rules are not operative in cases where the second or successive application is shown, on the basis of the application, files and the records of the case alone, conclusively to be without merit . . . . In such a case the application should be denied without a hearing." (373 U.S. at 15.)

Despite the overwhelming evidence in the Record, the District Court indicated that it was going to hold an evidentiary hearing. In so acting, the District Court has departed from the accepted and usual course of judicial proceedings, and the Court of Appeals has sanctioned this departure by refusing to grant a Writ of Prohibition. Certiorari should be granted by this Court to correct this departure.

III.

BY REFUSING TO PROHIBIT THE DISTRICT COURT FROM CONDUCTING A SECOND EVIDENTIARY HEARING ON A FACTUAL CONTENTION ALREADY MADE AND REJECTED AFTER A FIRST EVIDENTIARY HEARING, THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In his second Petition for Writ of Habeas Corpus, Townsend alleged, as one of the grounds, that he had been deprived of his right to counsel for two weeks after arrest, and that during that time, he had made an allegedly coerced confession. The lack of counsel evidence had already been submitted to the U.S. District Court during the first evidentiary hearing in December of 1963, and the District

Court thereafter found Townsend's confession to be nonetheless voluntary. The same point was also rejected by the Court of Appeals, which stated:

> "One contention, however, needs comment. The Petitioner now says that after having been arrested on January 1, 1954, he was not afforded the opportunity of consulting with counsel for a period of two weeks; that he was deprived of the benefit of counsel and, therefore, due process during the period of interrogation when his confession was given . . . .
>
> Because of the holding in *Escobedo* v. *Illinois*, we nevertheless have examined Petitioner's contention and believe it has no merit." (334 F. 2d 842, 843).

Despite the fact that the contention has already been considered, and despite the fact that the *Escobedo*[1] and *Miranda*[2] decisions have been held to be prospective only (*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)), the District Court insists on proceeding to an evidentiary hearing on this contention. The District Court has persisted in its attitude despite the six pleadings in which the County officials and the State officials have claimed that there has been an abuse of the writ. The District Court's action is clearly a departure from the usual course of judicial proceedings, and, in refusing to grant a Writ of Prohibition and/or Mandamus, the Court of Appeals has sanctioned this course of conduct. Certiorari should therefore be granted by this Court to remedy this situation.

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1. *Escobedo* v. *State of Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964).

2. *Miranda* v. *State of Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CHRONOLOGY IN TOWNSEND CASE

April 7, 1955—Charles Townsend was found guilty of murder and sentenced to death.

March 20, 1957—The Supreme Court of Illinois affirms that conviction. *People* v. *Townsend,* 11 Ill. 2d 301

October 14, 1957—Petition for Certiorari denied. *Townsend* v. *Illinois,* 355 U.S. 850

November 25, 1957—Rehearing denied. *Townsend* v. *Illinois,* 355 U.S. 886

April 28, 1958—Petition for Post Conviction relief denied. Criminal Court of Cook County, Illinois.

May 23, 1958—Petition for Writ of Error upon the denial of post-conviction relief denied by the Supreme Court of Illinois.

November 10, 1958 — Petition for Certiorari denied. *Townsend* v. *Illinois,* 358 U.S. 887

December 15, 1958—Petition for a Writ of Habeas Corpus denied by the U.S. District Court, Chicago, Illinois.

December 17, 1958—Appeal of the denial to issue a Writ of Habeas Corpus dismissed by the U.S. Court of Appeals. *United States ex rel. Townsend* v. *Sain,* 265 F. 2d 660

March 9, 1959—Supreme Court of the United States, on certiorari to review the dismissal of the appeal by the Circuit Court of Appeals, remands cause to the U.S. District Court for a hearing. *Townsend* v. *Sain,* 359 U.S. 64

June 24, 1959—U.S. District Court dismisses the Petition for a Writ of Habeas Corpus.

April 7, 1960—United States Court of Appeals affirms the U.S. District Court's dismissal. *United States ex rel. Townsend* v. *Sain,* 276 F. 2d 324

April 3, 1961—Supreme Court of the United States grants certiorari. *Townsend* v. *Sain,* 365 U.S. 866

March 18, 1963—Supreme Court of the United States remands the case to the U.S. District Court for a hearing on the Petition for a writ of Habeas Corpus. *Townsend* v. *Sain,* 372 U.S. 293

December 17, 1963—Hearing commences in the U.S. District Court upon the Petition for a Writ of Habeas Corpus.

January 13, 1964—U.S. District Court finds Townsend's confession to be voluntary, but issues a writ giving leave to the State of Illinois to retry the petitioner within four months after entry of findings of fact, conclusions of law and judgment order.

July 22, 1964—United States Court of Appeals reverses the decision of the U.S. District Court. *United States ex rel. Townsend* v. *Ogilvie,* 334 F. 2d 837

January 1965—Supreme Court of the United States denies certiorari. *Townsend* v. *Ogilvie,* 379 U.S. 984

April 7, 1965—U.S. District Court dismisses writ under mandate of Supreme Court and denies leave to file an amended Petition.

May 17, 1966—United States Court of Appeals affirms District Court's dismissal of the writ. *United States ex rel. Townsend* v. *Ogilvie,* 360 F. 2d 925

November 7, 1966—Certiorari denied by Supreme Court of the United States. *Townsend* v. *Ogilvie, Sheriff, et al.,* 385 U.S. 938

March 10, 1967—Townsend given leave to file new Petition for a Writ of Habeas Corpus.

March 13, 1967—Motion of Cook County officials to dismiss petition for habeas corpus filed and denied.

March 19, 1968—Respondent's amended motion to dismiss petition for habeas corpus denied.

March 25, 1968—Respondent's motion for leave to file motion for judgment on the pleadings denied.

July 18, 1969—Petitioner transferred from Cook County Jail to Illinois State Penitentiary.

July 22, 1969—Respondent's motion to dismiss because of petitioner's transfer out of their custody.

July 26, 1969—Townsend given leave to file instanter Amended Petition for writ of habeas corpus.

December 8, 1969—Respondent Warden Pate's motion to dismiss amended petition for habeas corpus denied *in toto*. On court's own motion, Townsend to be given a psychiatric examination. Respondent's answer to be filed in 20 days.

December 30, 1969—Warden Pate files Petition for Writ of Prohibition and/or Mandamus in U.S. Court of Appeals.

January 26, 1970—Response filed by Townsend in accordance with order of U.S. Court of Appeals.

February 10, 1970—Petition for Writ of Prohibition and/or Mandamus denied by Court of Appeals. No opinion rendered.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
Tuesday, February 10, 1970
Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 18153 FRANK J. PATE, Warden of Illinois State Penitentiary, *Petitioner,* vs. HON. JOSEPH SAM PERRY, United States District Judge, etc., *Respondent*	Original Petition for Writ of Prohibition and/or Mandamus.

This matter comes before the Court on the petition of Frank J. Pate, Warden of Illinois Penitentiary, for writ of prohibition and/or Mandamus, and the response of Honorable Joseph Sam Perry, United States District Judge, to said petition.

On consideration whereof, IT IS ORDERED that the said petition for writ of prohibition and/or mandamus be, and the same is hereby DENIED.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

By ---

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Name of Presiding Judge, Honorable Joseph Sam Perry.

Cause No. 67 C 389—Date: December 8, 1969.

Title of Cause: United States of America, ex rel. Charles Townsend vs. Frank J. Pate, Warden of Illinois Penitentiary.

Brief Statement of Motion: To amend Motion to dismiss filed on November 25, 1969, granted.

Motion to dismiss amended petition for writ of H.C. denied.

Respondent given 20 days to answer petition for writ of habeas corpus.

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In The

Supreme Court of the United States

October Term, 1969

No. 1545

FRANK J. PATE, Warden of the Illinois State Penitentiary,

Petitioner,

vs.

HONORABLE JOSEPH SAM PERRY,
United States District Judge,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS.

28 USC, Section 2244(a):

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

28 USC, U. S. Sup. Ct. Rule 19(1)b:

Considerations Governing Review On Certiorari

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

ARGUMENT.

The writ of mandamus is an extraordinary remedy which the petitioner here seeks to abuse by using it as a means for obtaining an interlocutory appeal of a non-appealable order of the district court judge denying petitioner's motion to dismiss the amended petition for habeas corpus.

The Court of Appeals for the Seventh Circuit denied the petition for a writ of prohibition and/or mandamus to issue since it failed to show exceptional circumstances to warrant issuance of the writ. The petition lacked a showing of a clear and indisputable right to the relief. In *Will* v. *United States,* 389 U.S. 90, 95-96, 88 S. Ct. 269, 273-274 (1967), this Court stated:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26, 63 S. Ct. 938, 941 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 217, 65 S. Ct. 1130, 1132, 89 L. Ed. 1566 (1945). . . .
>
> "We also approach this case with an awareness of additional considerations which flow from the fact that the underlying proceeding is a criminal prosecution. All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances,

> until after final judgment has been rendered by the trial court. This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him." (citations omitted).

Also see *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379, 383-384, 74 S. Ct. 145, 148 (1953).

The district court below has not usurped any power in denying petitioner's motion to dismiss Townsend's petition for habeas corpus as recognized by the Court of Appeals. On the contrary the district court acted in full compliance with its duties, authority and obligations under Section 2244(a) of Chapter 28 of the United States Code. There the ultimate standard for determining whether to entertain an application for a writ of habeas corpus, where there has been a determination of a prior writ of habeas corpus (a situation not covered in Section 2254 cited by petitioner), is "the judge or court is satisfied that the ends of justice will not be served by such inquiry."

The district court below, by its denial of petitioner's motion to dismiss, found the ends of justice would be served by entertaining Townsend's amended successive petition for habeas corpus. This Court in *Sanders* v. *United States,* 373 U.S. 1, 15, 16, 83 S. Ct. 1068, 1077, 1078 (1963) fully examined the discretion of the district court when dealing with a successive application for habeas corpus, and stated on page 1079:

> "The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collat-

eral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits. Cf. *Townsend* v. *Sain, supra,* 372 U.S., at 312, 318, 83 S. Ct. 293. We are confident that this power will be soundly applied."

The question before the district court below was not whether state remedies were exhausted, for this was not the applicant's first habeas corpus petition, but rather a successive application governed by the standards in Section 2244 and set out in the *Sanders* case. The district court did not abuse its discretion in ordering a psychiatric examination where the need resulted from a change in Townsend's condition subsequent to the filing of the first petition. Nor is there an abuse of discretion in litigating the question of the voluntariness of the confession in light of subsequent changes in the law (*Miller* v. *Pate*, 386 U.S. 1, 87 S. Ct. 785 (1967)). With respect to the question of the right to counsel there have been advances and changes in the law to protect this right besides *Escobedo* and *Miranda,* cited by petitioner on page 18 of his petition.

The petition for certiorari herein does not show that the Court of Appeals in denying the petition for a writ of mandamus sanctioned any departure from the accepted and usual course of proceedings which would warrant this Court issuing a writ of certiorari under any of the grounds set out in Rule 19(1)b of the Rules of the Supreme Court of the United States. Rather the Court of Appeals did not find the exceptional circumstances or clear and indisputable right to the writ of mandamus, because the district court judge's denial of the motion to

dismiss was a proper exercise of his discretion, not an usurpation of power. Thus petitioner's attempt to obtain a review of the merits of the case without proceeding according to the authorized appellate procedures, was properly thwarted.

CONCLUSION.

Respondent requests that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent and Charles Townsend

FILED
JUN 10 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1545

FRANK J. PATE, Warden of the Illinois State Penitentiary,

Petitioner,

vs.

HONORABLE JOSEPH SAM PERRY, United States District Judge,

Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

WILLIAM J. SCOTT,
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Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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FRANK J. PATE, Warden of the Illinois State Penitentiary,

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VS.

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Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

THE EXTRAORDINARY WRIT OF MANDAMUS IS AN APPROPRIATE REMEDY FROM THE EXTRAORDINARY ABUSE OF DISCRETION EXERCISED BY THE DISTRICT COURT AND FROM ITS ACTION TAKEN DESPITE ITS PATENT LACK OF JURISDICTION SINCE THERE IS NO EFFECTIVE REMEDY OF APPEAL.

If the action of the District Court is permitted to stand, the attempt of the States' to administer their criminal laws can be forever thwarted by the simple expedient of a District Judge ordering the state to file answers to *successive* and *identical* petitions for writ of habeas corpus, awaiting reversal on appeal, and then commencing the process all over again. "The effect of this order is to grant a perpetual stay of proceedings . . ." *Ex parte Simons,* 247 U.S. 231, 232 (1918). Without pleading an intervening change of law applicable to the case, without pleading newly discovered facts, and without pleading inadequacy of the available state remedies, Charles Townsend has been able to thwart the State of Illinois from administering its criminal laws. This is the clear abuse of discretion and usurpation of judicial power that justifies the writ. *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953); *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

"Here petitioner's basic allegation was a lack of power in a district court to order a mental and physical examination of a defendant. That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts . . ." *Schlagenhauf* v. *Holder,* 379 U.S. 104, 110 (1964). The basic position of the petitioner here is no less substantial than that of the petitioner in *Schlagenhauf.*

In view of these facts the "cryptic order of the Court of Appeals" requires reversal. *Will* v. *United States*, 389 U.S. 90, 98 (1967).

CONCLUSION

Petitioner requests that the Petition for Writ of Certiorari be allowed.

Respectfully submitted,

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